Nos. 14-840, 14-841

Supreme Court, U.S.
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In The
Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,

Respondents.

EnerNOC, INC., ET AL.,

Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT CALIFORNIA PUBLIC UTILITIES COMMISSION'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.

2. Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious.

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INTRODUCTION

Pursuant to Sup. Ct. R. 25.1, Respondent California Public Utilities Commission (California PUC) respectfully submits this brief on the merits in support of Petitioner Federal Energy Regulatory Commission (FERC) on the first question presented in Docket Nos. 14-840 and 14-841, which have been consolidated. The California PUC does not address the second question presented.

In accord with Sup. Ct. R. 24.2, the California PUC has not included all of the requirements in subparagraphs 1(a), (b), (d), (e), (f) and (g).

SUMMARY OF ARGUMENT

Both federal statutes and statutes of many States, including California, support allowing retail customers to participate in wholesale energy markets for a variety of economic, environmental, and policy reasons. The circumstances of this case indicate that the Electric Power Supply Association (EPSA) and other owners of traditional fossil-fueled generators are disingenuously pursuing "States' rights" in the courts in order to increase their profits by eliminating competition in wholesale energy markets.

The California PUC agrees with much of the analysis of subchapter II of the Federal Power Act (FPA), 16 U.S.C. §§ 824, *et seq.*, in *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), the

Majority Opinion of the D.C. Circuit below (Majority Opinion). The Majority Opinion supports States' rights to regulate retail electric markets and the utilities' procurement portfolios of resources to support grid reliability.[1] The California PUC, however, respectfully submits that the Majority Opinion's interpretation of the FPA goes too far by precluding State commissions from working cooperatively with the FERC to allow retail customers to bid their demand response capabilities into wholesale markets. In this regard, the California PUC supports the result suggested by the Dissenting Opinion of the D.C. Circuit below (Dissenting Opinion). "[T]here is a carve-out from the compensation requirement for ISOs and RTOs in States where local regulatory law stands in the way. Thus, the Order preserves State regulation of retail markets." *Id.* at 233.

A primary purpose of the FPA was "to curb abusive practices of public utility companies by bringing them under effective control." *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1975). Quoting from the legislative history of the FPA, the Supreme Court in *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 526 (1945) stated that the FPA:

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[1] *Id.* at 221-222; Petitioner Solicitor General's Appendix Supporting Petition for Writ of Certiorari (SG App.) at pp. 8a-9a (discussing the need for limiting FERC jurisdiction under the "practices affecting" rates provisions of FPA sections 205 and 206).

> takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions. [Rather, the FPA is intended to be a] complement to and in no sense a usurpation of State regulatory authority, and contain[s] throughout directions to the Federal Power Commission to receive and consider the views of the State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commission as does title II of this bill.

Thus, the FPA, which was enacted in 1935, was probably one of the first statutes demonstrating cooperative federalism.

Pursuant to the cooperative federalism provided by the Federal Power Act, the California PUC asked the FERC to develop a California Independent System Operator (CAISO) to facilitate the efficient management of the State's electric grid. California Public Utilities Code, §§ 345, *et seq.* described the State's intended purposes for the creation of an Independent System Operator for California as "conducting [grid] operations consistent with state and federal laws and interests of people of [the] state; [and] management of [the] transmission grid[ ]." During the development of the CAISO's current energy market design, the California PUC requested that the FERC allow demand response to directly bid into the wholesale market in order to mitigate generator market power,

support grid reliability and State environmentally-related energy procurement goals.[2] The FERC honored this request, observing that "demand response is an important measure in mitigating market power and protecting customers."[3] Subsequently, the FERC issued its Orders 719 and 745 to direct Independent System Operators and Regional Transmission Organizations (ISO/RTOs) to remove barriers preventing the participation of demand response in a variety of wholesale energy markets.

Principles of cooperative federalism support the FERC's Order 745 and its precursor, Order 719, because federal goals to increase demand response are in line with many States' goals and programs designed to allow direct bidding of retail customers' demand response into the wholesale market. This Court should therefore find that it is consistent with the Federal Power Act for the FERC to exercise its jurisdiction to promulgate rules permitting direct bidding of retail demand response in the wholesale markets for those States that so choose. Neither FERC's Order 745 nor its precursors require States to allow such direct bidding of retail demand response.

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[2] *Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 687 (2006); 2006 FERC LEXIS 2534, volume (vol.) 2 of 3 at *103-104.

[3] *Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 6 (2006); 2006 FERC LEXIS 2534, vol. 1 of 3 at *12-13.

The generator interests here seek to undermine this structure of cooperative federalism under the guise of protecting States' rights. The vacation of FERC's Order 745, however, essentially eliminates a class of competitors against whom generators would bid in wholesale markets. The FPA was not, however, intended to be used for the purpose sought by the Electric Power Supply Association: to exclude competition from wholesale markets. States designed retail market features to take advantage of wholesale demand side options under the framework provided by FERC's Orders 719 and 745 and prior FERC orders and case law.

STANDARD OF REVIEW

As the D.C. Circuit observed, the FERC is a creature of statute, and thus "'has no power to act unless and until Congress confers power upon it.'" *Cal. Indep. Sys. Operator Corp. (CAISO) v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984), provides the standard under which this Court reviews administrative decisions applying statutory language. *Chevron* finds that where Congress has clearly spoken on the question at issue, then the agency and courts must give effect to such statutory language. Where a statute is ambiguous as to the issue at hand then the Court must determine "whether the

agency's answer is based on a permissible construction of the statute." *Id.* at 842-843. In this regard, the agency is not entitled to deference in its statutory interpretation if "it appears from the statute or its legislative history that the [agency's interpretation] is not one that Congress would have sanctioned." *Id.* at p. 845; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233-234 (1986).

ARGUMENT

THE MAJORITY OPINION IS INCONSISTENT WITH THE FEDERAL POWER ACT AND STATE AUTHORITY OVER DEMAND RESPONSE

A. The Majority Opinion is Contrary to the Cooperative Federalism that Underlies the Federal Power Act

The Majority Opinion purports to analyze the facts at hand under the *Chevron* doctrine, and acknowledges that wholesale demand response affects wholesale rates. The Majority Opinion, however, finds that the FERC may not rely on its authority to regulate practices affecting wholesale rates under FPA sections 205 and 206, 16 U.S.C. §§ 824d and 824e, because States retain exclusive authority over retail markets under FPA section 201(b), 16 U.S.C. § 824(b). *Electric Power Supply Ass'n v. FERC,* 753 F.3d at 221-222.

The facts of this case, however, do not concern the FERC's authority over retail markets, which are explicitly reserved for State regulation under FPA

section 201(b), 16 U.S.C. § 824(b). Instead, this case addresses whether States, that have developed demand reduction programs for retail customers, may provide for the retail customers' participation in wholesale markets if the States and the customers so choose. *See* Dissenting Opinion, *Electric Power Supply Ass'n v. FERC*, 753 F.3d at 233. As discussed below, principles of cooperative federalism support that the FERC should act in concert with those States that seek to increase opportunities for demand response to participate in energy markets. States that choose to allow retail customers to bid demand response into wholesale markets are also acting consistent with the express goals of the Congress to eliminate barriers to demand response: The Energy Policy Act of 2005 (EPACT) called for the FERC to remove "unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets. "[4] This Court should therefore reverse the Majority Opinion.

The term "cooperative federalism" has been used by this Court to describe laws relying upon coordinated State and Federal efforts within a complementary administrative framework. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413, 421 (1973).

Section 201(b)(1) of the FPA, 16 U.S.C. § 824(b)(1), charges the FERC with regulating the transmission

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[4] Pub. L. No. 109-58, 119 Stat. 966.

and sale of electric power in wholesale markets in interstate commerce.[5] A primary tenet of the FPA is that the FERC "shall determine the just and reasonable rate(s) for electric services."[6] The Act distinguishes the roles of State regulatory agencies, such as the California PUC, with the duties of the FERC "on the basis of the type of service being provided and the nature of the energy sale."[7] Section 201(b)(1) of the FPA, 16 U.S.C. § 824(b)(1), provides authority to the State regulatory agencies over all other sales of electric power other than in the wholesale market (e.g., retail sales), as well as over distribution and generation facilities.

In *Conn. Light & Power Co. v. FPC*, 324 U.S. at 526, this Court explained:

> The [FPA] takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. The new parts are so drawn as to be *a complement to and in no sense a usurpation of State regulatory authority* and contain throughout directions to the Federal Power Commission *to receive and consider the views of State commissions*. Probably, no bill in recent years

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[5] 16 U.S.C. § 824(b)(1).

[6] 16 U.S.C. § 824e(a).

[7] *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006).

> has so recognized the responsibilities of State regulatory commissions as does [the FPA]. (Emphasis added).

The retail utilities' historic duties to procure a reliable long-term energy supply for retail customers are codified in State laws. These procurement practices in California, like many other States,[8] balance their energy reliability needs against the costs of infrastructure investments.[9]

Pursuant to the cooperative federalism provided by the Federal Power Act, the California PUC worked with the FERC to develop a California Independent

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[8] Cal. Pub. Utils. Code, § 454.5, subd. (b); (requiring that retail utilities' procurement plans which extend up to a ten-year planning horizon to match anticipated need with safe, reliable supply); Maryland Code Annotated, Public Utilities Article ("PUA"), §§ 5-101 and 7-510(c)(6) (requiring that the Maryland PSC assure "safe, adequate, reasonable and proper service for any class of public service company," and anticipate and meet "long-term, anticipated demand in the State for standard offer service and other electricity supply"); 52 Pa. Code §§ 57.141-57.154.

[9] *See* Cal. Pub. Utils. Code § 380 requiring that the California PUC develop a Resource Adequacy plan in collaboration with the CAISO; Cal. Pub. Utils. Code, § 454.5 (b) (requiring that retail utilities' procurement plans which extend up to a ten-year planning horizon to match anticipated need with safe, reliable supply); Maryland Code Annotated, Public Utilities Article ("PUA"), §§ 5-101 and 7-510(c)(6) (requiring that the Maryland PSC assure "safe, adequate, reasonable and proper service for any class of public service company," and anticipate and meet "long-term, anticipated demand in the State for standard offer service and other electricity supply"); 52 Pa. Code §§ 57.141-57.154

System Operator (CAISO) to facilitate the efficient management of the State's electric grid and the State's environmentally-related electric supply procurement goals.[10] California Public Utilities Code, §§ 345, *et seq.*, described the State's intended purposes for the creation of an Independent System Operator for California as "conducting [grid] operations consistent with state and federal laws and interests of people of [the] state; [and] management of [the] transmission grid." During the development of the CAISO's current energy market design, the California PUC requested that the FERC allow demand response be allowed to directly bid into the wholesale market in order to mitigate generator market power, support grid reliability and State environmentally-related energy procurement goals.[11] The FERC honored this request, observing that "demand response is an important measure in mitigating market power and protecting customers."[12] Subsequently, the FERC issued its Orders 719 and 745 to direct Independent System Operators and Regional Transmission Organizations

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[10] Cal. Pub. Utils. Code, §§ 345 *et seq.*; Cal. Pub. Utils. Code, § 345.5(c)(1), which requires that the CAISO "[c]onsult and coordinate with appropriate state and local agencies to ensure that the Independent System Operator operates in furtherance of state law regarding consumer and environmental protection."

[11] *Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 687 (2006); 2006 FERC LEXIS 2534, vol. 2 of 3, *108-109.

[12] *Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 6 (2006); 2006 FERC LEXIS 2534, vol. 1 of 3, *11.

(ISO/RTOs) to remove barriers preventing the participation of demand response in a variety of wholesale energy markets consistent with the EPACT of 2005.

In recent years, many States have sought to procure portfolios of energy resources, including demand response, that produce relatively low greenhouse gas emissions in order to improve the environment and reduce toxic emissions into the atmosphere. Such actions fall squarely within a State's police power to protect the health and welfare of its residents.[13]

Thus, cooperation between States and FERC to allow retail bidding of demand response in wholesale markets is both consistent with the FPA and with State authority over retail demand response.

B. EPSA and the Other Generators Seek to Prevent Competition in the Wholesale Market in Order to Exploit Consumers

Contrary to the FPA's goal of protecting consumers from exploitation (*Gulf States Utilities Co. v. FPC*, 411 U.S. at 758), exclusion of retail demand response programs reduces competition in the wholesale market. If a resource, such as demand response, is not able to bid into the wholesale energy markets, it will not be anticipated by the grid operator, which will then dispatch a resource that has bid into the

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[13] *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982) (protecting the health of its citizens is at the core of States' police power).

market in order to balance supply and anticipated demand. The grid operator may then have to pay a generator to reduce its output in order to reflect the unanticipated drop in demand.[14] In such a situation, generators may be paid not only to produce energy that is not actually needed to fulfill demand, but also exacts payment to reduce its energy production once the grid operator eventually perceives the drop of load.

While certain State regulation of procurement practices focuses on long-term resource planning and procurement, the CAISO runs a number of energy markets and energy balancing services (e.g., ancillary services) that operate on a day-ahead through real-time basis.[15] The CAISO's energy markets use a full network model that anticipates supply and demand and produces energy prices at each point within its operational grid where energy is either injected into

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[14] *See Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 284 (2006); 2006 FERC LEXIS 2534, vol. 1 of 3 at *212 (in CAISO's current market structure, "four types of ancillary services are procured: regulation up, regulation down [in which the generator reduces production of energy], spinning reserve, and non-spinning reserve.").

[15] *See Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 5 (2006); 2006 FERC LEXIS 2534, vol. 1 of 3 at *10-11.

or drawn from the grid.[16] These energy prices provide wholesale market signals to incent generators to supply energy where and when it is needed based on the price of energy at a given point on the grid.[17] Generation resources generally enter the grid through bidding into the wholesale market.[18] Thus, California's retail utilities, which once were vertically integrated and balanced their supply and demand themselves, no longer have the technology or dispatch authority of the CAISO, and are therefore dependent upon the CAISO to fulfill demand and maintain grid reliability.

The focus on short-term grid operations by ISO/RTO markets makes them especially valuable as a platform for demand response resources. The FERC has acknowledged the powerful effects of demand response during specific grid conditions. "It is widely accepted that dropping even a *few megawatts off the system at peak periods* is more efficient and economical than the incremental cost of generating them. Demand reduction offers a short-term and cost-effective means to provide additional resources during times of scarcity."[19] Demand response, when bid

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[16] *See Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 27 (2006); 2006 FERC LEXIS 2534, vol. 1 of 3 at *44.

[17] *Id.* at P 5, 2006 FERC LEXIS 2534 at *11.

[18] *See Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 131 and fn. 101 (2006); 2006 FERC LEXIS 2534 at *117-118.

[19] *Removing Obstacles To Increased Electric Generation And Natural Gas Supply In The Western United States* (emphasis

(Continued on following page)

into and dispatched through wholesale markets can provide quick balancing of the energy grid.[20] Thus, the FERC directed in 2001 that ISO/RTOs should authorize "retail customers (where permitted under state rules) who reduce consumption to resell their load reduction at wholesale at market-based rates."[21]

The CAISO's current markets were explicitly designed to mitigate generator market power by including the ability to dispatch demand response resources through the same markets as other energy supplies.[22]

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added), 94 FERC ¶ 61,272 at P 61,972 (2001); 2001 FERC LEXIS 499 at *21.

[20] Order 745 at P 10, SG App. at p. 61a, and fn. 20, citing Oak Ridge Nat'l Lab., Nat'l Renewable Energy Lab., Tech. Rep. NREL/TP-500-43373, ERCOT Event on Feb. 26, 2008: Lessons Learned (Jul. 2008).

[21] *Removing Obstacles To Increased Electric Generation And Natural Gas Supply In The Western United States*, 94 FERC ¶ 61,272 at P 61,972 (2001); 2001 FERC LEXIS 499 at *3 (this order arose in the context of the 2000-2001 California energy crisis). *See Cal. Pub. Utils. Comm. v. FERC*, 462 F.3d 1027, 1039 (9th Cir. 2006) (During the 2000-2001 energy crisis, energy sellers "quickly learned that the California spot markets could be manipulated by withholding power from the market to create scarcity and then demanding extremely high prices when scarcity was probable.").

[22] *See Order Conditionally Accepting CAISO Tariff for Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274 at P 689; 2006 FERC LEXIS 2534 vol. 2 of 3 at *109-110 ("Price responsive loads that have the requisite metering and the technical capability to respond quickly to the CAISO's instruction to reduce demand can be critical in times of tight supplies by providing reserves and reducing peaks.").

Wholesale energy market pricing magnifies the profit increases available to generators if competition is eliminated. Electric service suppliers submit a bid into the wholesale market that indicates the minimum price at which they are willing to operate. All resources, however, are paid the highest price submitted that was required to balance supply and demand at any given location. This market clearing price is known as the locational marginal price. Fundamental economic principles of supply and demand suggest that electric supply resources can make more money for their services if there are fewer suppliers bidding to satisfy demand.

The Majority Opinion below plays into generators' incentives to eliminate competition by excluding demand response from wholesale markets. This is why California PUC, all other States, consumer representatives and environmental groups that filed briefs in this case favor the States' option to allow retail demand response to bid into wholesale markets. *See* Joint States Brief in Support of Petitions for Writ of Certiorari (Joint States Brief); Brief of Delaware Division of the Public Advocate, Office of the People's Counsel for the District of Columbia, Maryland Office of the People's Counsel, New Jersey Rate Counsel, Pennsylvania Office of Consumer Advocate, West Virginia Consumer Advocate Division, Conservative Law Foundation, Environmental Defense Fund, The Environmental Law and Policy Center of the Midwest, Natural Resources Defense Council, The Sierra Club, and Citizens Utility Board (Brief of

Delaware, *et al.*) as Amici Curiae in Support of Petitioners in the instant case on February 17, 2015.

In reliance on federal-state cooperation regarding demand response, States have spent billions of dollars to develop and deploy technologies necessary to enable a smarter electric power grid. The California PUC authorized California Investor Owned Utilities investments of collected rates in advanced automated metering infrastructure, in which digital automation technologies are applied to all aspects of the industry, from generation to transmission, to distribution, to customer interface.[23] Importantly, Order 745 directs the wholesale price that is allocated to a demand response provider through the wholesale market, and does not set retail prices.

C. FERC Jurisdiction Over Practices Affecting Wholesale Rates Does Not By Itself Allow The FERC To Regulate The Retail Energy Market

The Majority Opinion correctly found that the "FERC can regulate practices affecting the wholesale market under §§ 205 and 206, provided the Commission is not directly regulating a matter subject to state control, such as the retail market." *Electric*

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[23] *See, e.g.*, California PUC Decision 06-07-027 *Final Opinion Authorizing Pacific Gas And Electric Company To Deploy Advanced Metering Infrastructure*, issued on July 20, 2006 at p. 66, Ordering Pgph. 1, 2006 WL 2102599 (Cal.P.U.C.).

Power Supply Ass'n v. FERC, 753 F.3d at 221-222.[24] The FERC, however, provided in its Order 745 and its previous Order 719, that States have the option of providing demand response into the wholesale market. Therefore, it is States such as California, Maryland and Pennsylvania, that have developed demand response programs to work in the wholesale market, which still are regulating the retail market but seeking the FERC's assistance to optimize demand response capabilities. As the Dissenting Opinion recognized, "there is a carve-out from the compensation requirement for ISOs and RTOs in States where local regulatory law stands in the way. Thus, the Order preserves State regulation of retail markets. This is hardly the stuff of grand agency overreach." *Electric Power Supply Ass'n v. FERC*, 753 F.3d at 233.[25]

In view of the above, there is no legal basis for any claim that FERC has exclusive jurisdiction over the demand response programs developed by the States, solely because they affect wholesale prices. Not only does this position ignore the jurisdictional provisions in section 201(b) of the FPA, 16 U.S.C. § 824(b), this view would be contrary to *both* the Majority Opinion and Dissenting Opinion below.

Perhaps the most salient analysis of Congress' intent regarding the FERC's jurisdiction was made by

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[24] SG App. at 8a-9a.

[25] SG App. at 33a.

this Court 70 years ago in *Conn. Light & Power Co. v. FPC*, 324 U.S. at 529-530:

> Technology of the [energy market] business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility. Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state. It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line.

This Court next observed that "Congress is acutely aware of the existence in vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed." *Id.* at 530. Despite having the option to occupy the field of energy from generator to market to toaster, Congress made clear with the language of the FPA that this statutory scheme was designed to work in concert with State authority and let States act as "laboratories" for market development from which

other States and the federal government may learn. *Id.* at 530.

The role of States as the authority in charge of procuring sufficient generation resources to assure electric reliability was expressly maintained in the Energy Policy Act of 2005:

> Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, . as long as such action does not result in lesser reliability outside the State. [26]

In the present case, consistent with the congressional intent in the FPA, the California PUC and other States have worked with the FERC to develop demand response programs from which other States can learn.

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[26] 16 U.S.C. § 824o(i)(3).

CONCLUSION

For the reasons discussed above, California PUC respectfully requests that the Court reverse the Majority decision of the U.S. Court of Appeals for the D.C. Circuit and find that the FERC possesses authority to regulate demand response that is bid into wholesale markets pursuant to State authorization.

Respectfully submitted,

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